



In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1272

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS,
LOCAL NO. 782, AFL-CIO; KEITH ARMSTRONG;
JAMES R. MARTIN; and JACK H. GRAY,

and

GUY R. RYAN, III; LAWRENCE BRUZDA; JAMES R.
TODD; INTERNATIONAL ASSOCIATION OF FIRE
FIGHTERS, LOCAL NO. 782, on behalf of themselves and
others similarly situated, *Petitioners*,

vs.

NORRIS OLSON,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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VS.

NORRIS OLSON,
Respondent.

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The respondent submits this brief in opposition to the Petition for Writ of Certiorari filed herein by the Petitioners.

I

OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit Court appears hereto as Appendix "A".

The opinion of the United States District Court for the District of Kansas appears hereto as Appendix "B".

II

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

III

**CONSTITUTIONAL PROVISIONS, STATE
STATUTES, CITY ORDINANCE
AND REGULATION**

Article 15, Section 2 and Section 12 of the Kansas Constitution appear hereto as Appendix "C".

Kansas Statutes K.S.A. 12-1011, 1014 and K.S.A. 75-4321(c) appear hereto as Appendix "D".

The pertinent provisions of the ordinances and regulations of the City of Salina, Kansas, appear hereto as Appendix "E" and Appendix "F".

IV

QUESTIONS PRESENTED FOR REVIEW

In the opinion of the respondent the questions presented for review are:

1. WAS THE DISMISSAL OF KEITH ARMSTRONG FROM THE CITY OF SALINA, KANSAS, FIRE DEPARTMENT IN VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHTS?
2. WERE THE REASONS GIVEN AND RELIED UPON BY THE COURTS BELOW FOR DISMISSING ARMSTRONG IN VIOLATION OF HIS FIRST AMENDMENT RIGHTS?

V

STATEMENT OF THE CASE

This action results from two consolidated civil rights cases wherein three former members of the City of Salina, Kansas Fire Department and the International Association of Fire Fighters (I.A.F.F.) Local 782, brought suit against Norris Olson, the City Manager of Salina, Kansas, for injunctive relief, money damages, reinstatement as city firemen and attorney fees. Keith Armstrong was the President of Local 782 at the time of his discharge. Captain Jack Gray was retired and Lt. James Martin was discharged shortly before the discharge of Keith Armstrong.

The thrust of the petitioners' case in the District Court was based on the firing and retirement of the three firemen because of union membership and/or union activities. On appeal to the TENTH CIRCUIT, the petitioners departed from said approach and for the first time contended that petitioner Armstrong's due process rights were violated by failing to afford him a hearing prior to his dismissal. In said appeal, the petitioners abandoned their claim that the discharge and retirement of Martin and Gray were unlawful. As to them, the petitioners no longer sought damages nor reinstatement.

At the time of his discharge, Petitioner Armstrong as well as all other City employees of Salina were employees at will with the right to voluntary termination and subject to termination by the City Manager. None of the city employees of Salina (including respondent Olson, City Manager) had a contract, commission, fixed term of employment or tenure status and a hearing prior to termination was *not* required nor provided for by any law of the state of Kansas or any ordinance or regulation of the City of Salina. At the time of Armstrong's dis-

charge, it was illegal under Kansas law for a municipality in Kansas to bargain with Unions representing city employees as to terms and conditions of employment.

Local Union 782 of the I.A.F.F. had existed among the firemen in Salina for approximately 30 years and at the time of trial 44 members of the Salina Fire Department, out of a total complement of 68, were members of the Fire Fighters Union.

All of the fire fighters who testified as witnesses at the trial at one time or another belonged to the Fire Fighters Union including the Director of Safety, the Fire Chief and the Fire Captains. None of the petitioners nor any of the witnesses were suspended or discharged because of Union membership. Union as well as non-Union fire fighters were disciplined, promoted and demoted during the time that Olson was City Manager.

Because of an air of unrest and general uneasiness created by petitioner Armstrong and a few other firemen, respondent Olson requested the Board of City Commissioners (governing body of the City of Salina) to conduct an investigation into the affairs of the Salina Fire Department. All of the Salina firemen were interviewed during the course of the investigation and at the conclusion thereof the Board of City Commissioners had decided to recommend against any action being taken against any individual fireman because the problems within the department had existed over a long period of time. The Commissioners requested a follow-up meeting with Armstrong as President of the Local Union for the purpose of getting his ideas as to a solution of the problems. After receiving the invitation to such meeting but a day or so before the meeting was scheduled, petitioner Armstrong delivered to the fire chief the "ACTION" letter. Said letter is set out verbatim on page A4 Appendix A in the opinion

of the Court below. When the Commissioners met with Armstrong on January 9, 1971 they had seen the "ACTION" letter which they felt constituted harassment and a "final blow". When questioned by the Commissioners petitioner Armstrong refused to disclose the number of firemen who voted in favor of the letter. Some Commissioners testified at the trial they believed Armstrong alone had written the letter and Armstrong presented no testimony from union firemen to the Commissioners or subsequently at the trial, that the letter had been approved by anyone other than himself.

The Commissioners recommended to respondent Olson that petitioner Armstrong be dismissed because of his lack of cooperation, insubordination and his general attitude and action which created dissention among the employees of the Fire Department and disrupted the effectiveness of the whole department.

The District Court in its Finding of Fact No. 14 found that the discharge of petitioner Armstrong was based on his disregard of established administration policies, failure to follow the chain of command, insubordination, his "demanding" attitude toward his supervisors and particularly because of the threatening "ACTION" letter written and delivered by him to the administration. (See pages A22-A23 Appendix B, set out verbatim).

After the discharge of petitioner Armstrong, these two consolidated cases were filed by the petitioners besides four State actions against this respondent, two of which were finally disposed of in the Supreme Court of Kansas. One of these cases was a Mandamus action involving the issues presented in these cases in the trial Court below and was decided against the petitioners and reported in *Armstrong, et al. v. Norris Olson, et al.*, 211 Kan. 333, 507 P.2d 323.

VI

ARGUMENT

QUESTION 1.

Was the Dismissal of Keith Armstrong From the City of Salina, Kansas, Fire Department in Violation of His Fourteenth Amendment Rights?

The record underlying the litigation upon which this proceeding is based can hardly justify the suggested characterization of petitioner Armstrong as a "David" or "one single, insignificant fire fighter hurling his stones (to slay 'Goliath city hall') to overcome the barriers denying him his constitutional rights." On the contrary when properly focused, we have a picture of petitioner Armstrong, President of Union Local 782 (International Association of Fire-Fighters), who mistakenly believed that as a Union President, he could insulate himself against the responsibility for his actions which prompted his dismissal from the Fire Department by the respondent Olson as City Manager of Salina. With full knowledge of the Kansas law at the time, he embarked on a crusade which was designed to bring the city government of Salina to its knees on his terms. His tactics and demeanor constitute harassment and insubordination and some of his demands of city government were clearly in violation of the law of the state of Kansas at the time. The city of Salina through its City Manager, the respondent herein, overlooked much of the petitioner's conduct until there was no choice left but to discharge him for reasons completely unrelated to constitutional rights.

Petitioner Armstrong was dismissed from his employment with the Salina Fire Department on January 13, 1971. The action taken by respondent Olson must

be viewed in the light of the law as it existed in January of 1971, when the action was taken. (*Bishop v. Wood*, _____ U.S. _____, 96 S.Ct. 2074, 48 L.Ed.2d 684) (*Hostrop v. Bd. of Jr. College Dist. No. 515*, 523 F.2d 569 (7th Cir. 1975)).

In January 1971, the controlling law in Kansas applicable to public employees throughout the State was:

(1) A public employee having no contract, commission, fixed term of employment on tenure status is an employee at will and his employment is subject to termination at his will or at the will of the authority making the appointment.

Kansas Constitution, Article 15, Sec. 2. (Appendix C page A26).

Salina City Code Sec. 2-77. (Appendix E pages A28-A29).

56 Am Jur. 2d, Municipal Corp., Sec. 333.

Sturgis v. City of Kansas City, 151 Kan. 658, 100 P.2d 661.

Jenkins v. City of Lindsborg, 152 Kan. 727, 107 P.2d 705.

Harris v. City of Topeka, 183 Kan. 359, 327 P.2d 1088.

(2) The only statutory or constitutional limitation in Kansas on a City Manager's authority to discharge a public employee is the "Right-to-Work" Amendment to the Kansas Constitution, Article 15, Sec. 12 (Appendix C page A26) and under general constitutional principles, the restriction against discharge for the exercise of a right protected by the First Amendment (*Jones v. Hopper*, 410 F.2d 1323, 10th Cir. 1969; *Lontine v. VanCleave*, 483 F.2d 966, 10th Cir. 1973);

(3) Absent statutory authority, the sovereign authority (State of Kansas or any political subdivisions thereof)

is prohibited from recognizing a labor union as bargaining agent for public employees as to wages or terms and conditions of employment. To do otherwise and make such negotiations the basis for appropriations is unlawful (*Wichita Public Schools Employees Union v. Smith*, 194 Kan. 2, 397 P.2d 357 (1964)).

As pointed out in the earlier statement of the case in this brief, the petitioners have departed from the approach used in the District Court wherein their complaint was that petitioner Armstrong was discharged because of Union membership and/or Union activity. No complaint was made in the trial Court that Armstrong's dismissal was unlawful for lack of a pre-dismissal hearing. The Court of Appeals for the Tenth Circuit so noted in its opinion. It also noted that there was a pre-dismissal exchange or conference between Armstrong and the Salina City Commission.

The Court then observed:

No evidence was presented as to whether this hearing might comport with due process standards. In *Bertot v. School District No. 1*, 522 F.2d 1171, 1177, this Court held that

The Constitution does not require a hearing before non-renewal of a non-tenured teacher's contract, unless he can show that . . . he had a "property" interest in continued employment, despite the lack of tenure . . .

Thus, the characteristics of a "property" interest must be factually shown; there being no evidence in the record on this issue we are foreclosed from considering it. (Page A5 Appendix A).

We have no quarrel with the authorities cited by the petitioners in their brief as applied to the facts with which they were concerned but they are manifestly *not* applicable here. The cases relied upon by the petitioners holding that public employment amounts to a "property" interest cognizable under the due process clause, involved statutes, rules or regulations that delineated the grounds upon which public employees could be discharged. Petitioners acknowledge that at the time of Armstrong's dismissal there were no state or city laws, rules or regulations limiting the discharge of public employees to certain standards or criteria. (Petitioners' brief page 23). They do not even argue a "de facto" system, practice or policy. Realizing the distinction between such public employees and petitioner Armstrong as an "at will" employee, they argue that the holding in *Goss v. Lopez*, 419 U.S. 565 (1975) by implication eliminates the concept of "at will" employment in the public sector. The respondent submits that such a conclusion is without reasonable or legal foundation and is nothing more than petitioners' asking the Court to substitute its judgment for that of the Kansas legislature and the governing body of the City of Salina.

Respondent submits that the arguments presented by the Petitioners have been directly contradicted by this Court in the recent case of *Bishop v. Wood*, supra, _____ U.S. _____, 96 S.Ct. 2074, 48 L.Ed.2d 684. This Court held:

- (a) "A property interest in employment can be created by ordinance, or by an implied contract, but in either case, the sufficiency of a claim of entitlement must be decided by reference to state law." (Head Note No. 4)
- (b) "Property interests are not created by Constitution; rather, they are created, and their dimen-

sions are defined, by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.” (Head Note No. 5a, 5b)

Respondent further submits that *Bishop v. Wood* also disposes rather conclusively of petitioners’ “liberty” interest argument.

Petitioners claim that Armstrong also has a protectible “liberty” interest within the scope of the due process clause of the Fourteenth Amendment. They claim that the reasons for Armstrong’s discharge could irreparably harm Armstrong’s name, reputation and honor. Further, they say, such charges carry the connotation of “troublemaker”. There is no evidence in the record establishing that his good name, reputation, honor or integrity are at stake. Nor is there any evidence clearly showing a reduction in earning capacity in relation to time spent in his subsequent employment.

Discharging him is one thing but publicizing the reasons for the discharge is an entirely different matter. When the City Commission of Salina undertook the investigation of the Fire Department, it was clearly understood by everyone in any way involved that the interviews and results thereof would be kept confidential. The suspension and discharge of petitioner Armstrong and the reasons therefor were revealed to the general public by Armstrong himself as chief officer of the Fire Fighters Union.

The record in the case will show that the suspension in February 1970, was circulated to the news media and general public by way of (1) the resolution of censure of the City Commission of Salina, adopted at the State

convention of fire fighters in Wichita, Kansas, which resolution was initiated by Armstrong and a few other members of the Executive Board of the Salina Local and (2) the petition circulated at the instigation of the Executive Board (Armstrong as President) seeking the appointment of a “Fact Finding Board”, including members of the Executive Board of the Union, to make binding findings of fact on respondent Olson. The discharge in January 1971 was circulated to the news media and general public by way of the advertisement in the Salina Journal sponsored by the Local Union, signed by the Executive Board with Keith Armstrong shown as President.

As in *Hostrop II*, supra, petitioner Armstrong himself directly participated in making public the charges or reasons for the suspension and discharge. There the Court held that if the petitioner (Hostrop) was damaged at all, the injuries or damages to his reputation and character were caused by himself and not the Board. See also *Shirck v. Thomas*, 486 F.2d 691 (7th Cir. 1973).

QUESTION 2.

Were the Reasons Given and Relied Upon by the Courts Below for Dismissing Armstrong in Violation of His First Amendment Rights?

The petitioners have conceded in the Courts below that they had the burden of proving that the exercise of First Amendment rights was, in fact, the reason for Armstrong’s discharge. The respondent does not disagree with the application of the law flowing from the authorities cited by petitioners and for sake of brevity, respondent will not burden this brief with the same citations. The petitioners contend that various activities protected by the First Amendment were the actual reasons for the discharge of Armstrong. The respondent contends otherwise and

the trial Court, after an extensive and full trial, made specific findings as to the reasons for the discharge of petitioner Armstrong and the other two firemen. (Finding of Fact Nos. 13, 14, 15, 16, 17 & 18, Appendix B pages A22-23). The Court of Appeals for the Tenth Circuit in reviewing the Findings of Fact of the trial Court and rejecting the arguments of the petitioners states:

"The trial Court having observed the witnesses and weighing the evidence, concluded these were the reasons for Armstrong's dismissal. Our review of the evidence indicates these findings are neither vague nor did they fall within the category of 'clearly erroneous'. We agree with the trial Court. There was insufficient evidence that the reasons given for the dismissal of Armstrong would impermissibly chill First Amendment rights. We note again petitioners have shifted from their basic approach in the trial that Armstrong was illegally dismissed for Union activity." (Appendix A page A6)

Respondent concedes that under the authorities cited by the petitioners and under the rules recognized in *Bishop v. Wood*, supra, a public employee may not be dismissed from his employment because of his exercise of constitutionally protected rights under the First Amendment. Though in this case there may have been some infringement of First Amendment rights during the course of the protracted conflict in Salina, the evidence showed little if any relationship between any restrictions and Armstrong's dismissal. Again, the Court of Appeals for the Tenth Circuit observed:

"On the contrary, Salina eventually provided every fireman with a chance to discuss any and all problems with city officials. The case, in its appropriate appel-

late posture and as presented to the trial Court, does not arise beyond one of factual determination. The record reflects no clear error in this regard and the judgment is accordingly affirmed." (Appendix A page A6)

This respondent submits that since the required evidence supporting the claim that the discharge of Armstrong was not related to the exercise of a constitutionally protected right, the dismissal was lawful.

As earlier pointed out, the petitioners are now apparently satisfied that the discharge and retirement of the two other firemen were justified and completely lawful. The record amply supports the reasons for the discharge of Armstrong on lawful grounds. The Salina City Commission after interviewing all of the members of the Salina Fire Department concluded that he (Armstrong) was a disrupting influence in the fire department. The respondent as City Manager, independently came to the same conclusion. The trial Court did likewise in its Findings of Fact and the Court of Appeals for the Tenth Circuit concurred as to the reasons for the dismissal of Armstrong. The fact that he was the President of the local Union at the time was held not to insulate him against the responsibility for his actions which prompted his dismissal. Characterization of Armstrong and his activities are reflected throughout the record, some of which include the following:

- a. He was one of the troublemakers who was working against the department and was upsetting some of the young personnel in the Fire Department; he was whippy, sarcastic and caused people to flare up.

- b. He got the captain into difficulty by calling City Hall asking what the City Manager's wages were.
- c. He headed the small group of fire fighters that attended the State Convention in Wichita and was instrumental in securing the adoption of the resolution of censure of the Salina City Commission. The Salina Local never voted on the proposed resolution and the contents of the resolution were untrue as petitioner Armstrong well knew.
- d. He generated "strike talk" within the department though striking was unlawful.
- e. He was interruptive of his superiors and was also defiant of them.
- f. He was instrumental in having the Salina police department accused of harassing Salina fire fighters, which gained statewide attention through the radio—the false information was given to a radio announcer by Armstrong and a few others at the State convention in Wichita.
- g. Despite his knowledge of the unlawfulness of his action he insisted that the defendant Olson recognize the Executive Board of the local union as bargaining agent for the fire department, though the defendant could not lawfully do so.
- h. He prepared and delivered the "ACTION" letter to the administration which added to the air of unrest, turmoil and heated atmosphere. The timing of the preparation and delivery aggravated the existing conditions and was designed to "pressure" the administration.

Petitioners would have this Court view the actions of petitioner Armstrong in submitting the "Action" letter at the time and under the conditions then existing as a simple "request for a meeting on the issues of the day". The quotation of the petitioners in their brief on page 34 is particularly pertinent here. "TO ACCEPT . . . (this view) . . . WE WOULD HAVE TO PRETEND NOT TO KNOW AS JUDGES WHAT WE KNOW AS MEN" (Emphasis supplied).

In our Statement of the Case we refer to that portion of the record covering the timing and the conditions existing when the "Action" letter was delivered by Armstrong. The City Commission had almost concluded its "good faith" investigation of the fire department and had requested another meeting with petitioner Armstrong to seek his further recommendation and help in resolving the turmoil and unrest within the fire department. The meeting was scheduled, with Armstrong's approval for January 9, 1971, but Armstrong notwithstanding elected to deliver the "Action" letter to the Fire Chief one or two days before the meeting.

In making the Findings of Fact 14, 16 and 18 (Appendix B pages A22-A24), the trial Court must have concluded, as did the City Commission and respondent Olson, that the letter was more than a "request"; that it constituted a demand of immediate recognition of the Executive Board of the Local, though unlawful; and that it reflected an attitude of harassment and insubordination.

Petitioners in the trial Court below tried every conceivable way to interject an anti-union motive or attitude into the case, which motive or attitude we submit is refuted by the testimony and history of the fire fighters Union without harassment by anyone or from any source

for approximately 30 years. In the State Court cases filed by the petitioners, and hereinbefore referred to, the same approach was used but, as in the Court below in these cases, without success. The trial Court's Finding of Fact 17 directly addressed itself to the point. (Appendix B page A23).

VII

CONCLUSION

Although respondent recognizes that a public employee is entitled to due process consideration of First Amendment rights, the mere assertion of such a constitutional claim does not convert the federal procedure into a plenary administrative review.

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in the Supreme Court of the United States, and that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS,
LOCAL NO. 782 AFL-CIO; KEITH ARMSTRONG,
JAMES R. MARTIN, and JACK H. GRAY,

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GUY R. RYAN, III; LAWRENCE BRUZDA, JAMES R.
TODD, INTERNATIONAL ASSOCIATION OF FIRE
FIGHTERS, LOCAL NO. 782, on behalf of themselves
and others similarly situated,

Plaintiffs-Appellants,

v.

NORRIS OLSON,
Defendant-Appellee.

No. 75-1159

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

October 29, 1976

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Before LEWIS, Chief Judge; McWILLIAMS, Circuit Judge,
and ZIRPOLI*, District Judge.

*Of the Northern District of California, sitting by designation.

LEWIS, Chief Judge.

This appeal arises from two consolidated civil cases. Keith Armstrong, James R. Martin and Jack H. Gray, three former members of the Salina Fire Department and the International Association of Fire Fighters [I.A.F.F.] Local 782, brought suit against Norris Olson, the city manager of Salina, Kansas, for money damages and reinstatement as city firemen. Guy Ryan, Lawrence Bruzda, James Todd and a class consisting of all the members of Local 782 of I.A.F.F. also brought an action seeking injunctive relief against Olson. The gravamen of both these claims was that Olson had fired Armstrong, Martin and Gray for union activities and was actively restricting the rights of other firemen to participate in union activities all in violation of basic constitutional rights. The trial court found there was insufficient evidence to support plaintiffs' claims and entered judgment for Olson.

Plaintiffs appeal the judgment and order of the district court¹ urging that the court erred in relying on the vague reasons given for Armstrong's dismissal by the city and in concluding Armstrong was not entitled to the procedural due process afforded protectible interests. Plaintiffs also allege that the trial court erred because its conclusions of law were contrary to its findings of fact and established law and inadequate to support the verdict as a matter of law.

Armstrong, Gray, Martin and the other city employees of Salina were employees at will. They had no contract, commission fixed term of employment or tenure and were subject at any time to termination by the city manager.

1. The appeal is limited to issues relating to appellant Armstrong.

A hearing prior to termination was not required by Kansas law or any regulation of Salina. At the time of the discharges complained of, it was illegal under state law for a municipality in Kansas to bargain with unions representing city employees. Armstrong, at the time of his discharge, was president of Local 782 of the I.A.F.F. The union had existed among the firemen for approximately 30 years; roughly one-half to two-thirds of the firemen were members of the union.

At a state convention of the I.A.F.F. in February of 1970 a resolution of censure of the Salina City Commission was adopted. The resolution gained statewide publicity. The city manager, Olson, then placed severe restrictions on the firemen's rights to publicly criticize the city administration. Numerous other incidents and conflicts also occurred. Because of these symptoms of unrest and the general air of uneasiness Olson finally requested the city commissioners to conduct an investigation into the affairs of the Salina Fire Department. The investigation began in the fall of 1970 and concluded in January of 1971.

The commissioners called all the Salina firemen to testify as well as the Police Chief, Fire Chief, and other city officials. At the conclusion of the investigation Armstrong was requested on January 5, to meet again with the commissioners on January 9, for the purpose of getting his ideas as to a solution. The commissioners had previously decided not to recommend action against any individual because the problems had existed over a long period of time. It should be noted that Armstrong had been involved in several of those problems. On January 7 or 8, Armstrong delivered to the Fire Chief the following letter:

Chief Lacy
222 W. Elm
Salina, Kansas 67401

Dear Chief:

The Executive Board of Local #782 has been directed by the membership to meet with you before Monday January 11, 1971.

We wish to discuss your action toward certain union members, as to merit raises, intimidations, and firing. Two other items for action are vacations, and the Western show.

The membership of Local 782 wants you to know that if you are not willing to meet, and take action, ACTION will be taken.

I remain,

/s/ Keith E. Armstrong
Keith E. Armstrong
President, IAFF Local 782

When the commissioners met with Armstrong on January 9, they had seen the letter, quoted *supra*, which they felt constituted harassment and a "final blow." Armstrong refused to disclose to the commissioners the number of firemen who had voted for the letter. Some commissioners testified they believed Armstrong alone had written the letter. Armstrong presented no testimony from union firemen to the commissioners or subsequently at trial, that the letter had been approved. The commissioners recommended to Olson that Armstrong be discharged after his subjective refusal to consider resignation. Olson dismissed Armstrong citing the following reasons:

The investigation findings were that his lack of cooperation, insubordination and general attitude created dissension among all employees and disrupted the effectiveness of the entire department.

(Emphasis added.)

Plaintiffs urge that the trial court erred in concluding Armstrong was not entitled to the procedural due process accorded protectible interests under the fourteenth amendment. Plaintiffs have not previously contended that Armstrong's dismissal was unlawful for lack of a pre-dismissal hearing. We note that there was a pre-dismissal exchange or conference between Armstrong and the Salina City Commission. No evidence was presented as to whether this hearing might comport with due process standards. In *Bertot v. School District No. 1*, 522 F.2d 1171, 1177, this court held that

The Constitution does not require a hearing before non-renewal of a non-tenured teacher's contract, unless he can show that . . . he had a "property" interest in continued employment, despite the lack of tenure

....

Thus, the characteristics of a "property" interest must be factually shown; there being no evidence in the record on this issue we are foreclosed from considering it.

The plaintiffs also urge that the court erred because the reasons given by Olson and relied upon by the district court in Finding of Fact No. 14 for dismissing Armstrong were constitutionally vague, chill first amendment freedoms and are in conflict with other decisions of this court. Finding of Fact No. 14 is as follows:

In February of 1970, defendant Norris Olson did order plaintiff, Keith Armstrong, suspended for two

weeks without pay, and in January 1971, defendant Norris Olson did discharge plaintiff, Keith Armstrong, from his employment in the Salina Fire Department. The suspension and discharge of plaintiff, Keith Armstrong, was based on his disregard of established administration policies, failure to follow the chain of command, insubordination, his "demanding" attitude to his supervisors, and particularly because of the threatening "ACTION" letter written and delivered by him to the Administration (Plaintiffs' Exhibit 12). Said letter prompted the City Commission, as part of its investigation report, to recommend his discharge from the Fire Department.

The trial court, having observed the witnesses and weighed the evidence, concluded these were the reasons for Armstrong's dismissal. Our review of the evidence indicates these findings are neither vague nor would they fall within the category of "clearly erroneous." We agree with the trial court there was insufficient evidence that the reasons given for the dismissal of Armstrong would impermissibly chill first amendment rights. We note again plaintiffs have shifted from their basic approach in the trial that Armstrong was illegally dismissed for union activity.

Some first amendment rights were infringed upon by Olson during the course of this protracted conflict in Salina. However, the evidence showed little relationship between those restrictions and Armstrong's dismissal. On the contrary, Salina eventually provided every fireman with a chance to discuss any and all problems with city officials. The case, in its appropriate appellate posture and as presented to the trial court, does not arise beyond one of factual determination. The record reflects no clear error in this regard and the judgment is accordingly

Affirmed.

APPENDIX "B"

Civil Action No. T-4880

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS,
LOCAL NO. 782, AFL-CIO, KEITH ARMSTRONG,
JAMES R. MARTIN, and JACK H. GRAY,
Plaintiffs,
vs.
NORRIS OLSON,
Defendant.

Civil Action No. T-4890

GUY R. RYAN, III, LAWRENCE BRUZDA, JAMES R.
TODD, INTERNATIONAL ASSOCIATION OF FIRE
FIGHTERS, LOCAL 782, on behalf of themselves
and others similarly situated,
Plaintiffs,
vs.
NORRIS OLSON,
Defendant.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

January 8, 1975

FINDINGS OF FACT AND CONCLUSIONS OF LAW

STATEMENT

This is a consolidated civil rights case in which plaintiffs were previously employed individual fire fighters of

the City of Salina, and the International Association of Fire Fighters, Local No. 782, of which individual plaintiffs had been members. The defendant in the cases is Norris Olson, the City Manager of the City of Salina, charged with the responsibility of the administration of all the affairs of the City, including the Fire Department. Norris Olson is the sole defendant, the defendant City of Salina having been dismissed as a party.

The Pretrial Order (Doc. 27) describes the contentions of the parties and describes the issues to be considered. These need not be repeated here.

RES JUDICATA

The defendant has raised the defense of res judicata. He contends that the issues now being raised have been considered and decided in an earlier action between the parties, particularly alluding to the case of *Armstrong v. City of Salina*, decided by the Kansas Supreme Court and cited in 211 Kan. 333, 507 P.2d 323. This Court does not agree that the State Court case is a bar to the case at bar and overrules this defense.

DEFENDANT'S COUNTERCLAIM

The defendant has filed a counterclaim in which he seeks to have this Court determine that a personnel manual adopted by the City Council of the City of Salina consists of reasonable administrative regulations and guidelines, and their implementation and enforcement would not unreasonably restrict or infringe upon civil or constitutional rights of any employee of the City of Salina, including plaintiffs.

It is noted that this manual was adopted after the events involved in the principal action had occurred. The

Court seriously questions the standing of the defendant to maintain the claim alleged in the counterclaim. The personnel manual was adopted by the City Council and not by defendant. There is no challenge of his use of the manual. It is not an issue nor does its validity have any materiality to the issues in the principal action. This action is between citizens of Kansas. No diversity exists. A Kansas State Court, under the circumstances, should be afforded the first opportunity to pass on the questions raised. The State Court has not yet done so.

Furthermore, in the exercise of judicial discretion, this Court believes that its exercise of jurisdiction would not result in judicial economy, convenience or fairness to the parties. The Court, therefore, declines to consider defendant's counterclaim.

PLAINTIFFS' MOTION TO AMEND

Plaintiffs have asked to amend their pleadings to conform to the proof. While a formal application is not necessary, the request should indicate, under Rule 15(b), the intended scope of the amendment and give the other party to the action and the Court notice of what was intended. This, plaintiffs have not done. However, the fact that the defendant Olson allegedly made many material admissions of fact not previously known to plaintiffs does not change the issues to be determined by the Court. An amendment to conform to the proof is not deemed necessary and is, therefore, by the Court denied.

It is apparent from an examination of the record that an underlying source of the problems relating to the Salina Fire Department and its personnel was activity engaged in by some of the members of plaintiff union. Such activ-

ity by these members developed a situation which the City Commission and the defendant Olson concluded required remedial treatment. Though this is true, there are some basic principles, established by decisions of the Court of Appeals for the Tenth Circuit, which this Court must observe.

A city fire fighter has a constitutional right to join a labor union and cannot be discharged from his employment for joining or continuing membership in a union, absent a showing of compelling state interest. *Lontine v. Van Cleave*, 483 F.2d 966. In this case, the Court of Appeals further held that though a public employee may not have a right to continued public employment and may not be entitled to any form of notice of hearing under state law, or under constitutional principles, he may not be suspended or dismissed for the exercise of his constitutional rights.

The *Lontine* case was followed by *Abeyta v. Town of Taos*, 499 F.2d 323. There, in a civil rights action, former municipal employees claimed damages and injunctive relief against the mayor, the city council, and the City of Taos, which was dismissed as a party. The facts in that case have some similarity to the circumstances before us here. In *Abeyta*, the city council decided that the Taos police department needed to be revamped. It gave the police chief 30 days to accomplish this task. He resigned and one Rivera was appointed chief in his place. Rivera discharged an officer for bypassing the chain of command and for dereliction of duty. The police commission approved the officer's dismissal and he was officially terminated by the town council. Another officer DeBaca was terminated because of violation of department rules.

Thereafter, the remaining police officers became increasingly dissatisfied with the chief's actions and policies,

they sent a letter to him complaining of harassment, requesting better working conditions and demanding a meeting with the police commissioner. A meeting took place attended by the town council. The grievances were discussed and as a result of the meeting, three more police officers were suspended and other officers were placed on probation. An attorney demanded a hearing before the council, the police commission or an impartial panel.

Though not required by statute, an impartial panel was constituted, it requested the police officers to attend meetings which lasted two weeks. Most officers attended though two who were suspended did not. On recommendation of the panel, five officers were discharged. These officers demanded reinstatement and a hearing. Their demands were ignored. The action brought by discharged and suspended officers resulted in a trial at which the trial court found: (p. 326)

"(1) appellants were not entitled to a termination hearing because their employment was not property interest protected by due process; (2) their letter to Rivera revealed problems the town of Taos could legitimately correct by appropriate action; (3) DeBaca's termination did not conform to state law because not enough votes were cast in favor of termination, but did not merit relief; and (4) Valdez' termination, without a hearing, deprived her of due process and infringed upon her liberty because the charges against her could injure her reputation. Accordingly, the trial court ordered Valdez reinstated with back wages, but dismissed the action as to the remaining plaintiffs. Valdez has not appealed."

The Court of Appeals in affirming the trial court's rulings determined that:

(1) The requirements of due process apply only to deprivation of interests encompassed with the 14th Amendment's protection of "property" and "liberty," and public office or employment generally is held not to be a property interest within the 14th Amendment. At best a public employee has a mere expectation of continued employment that is not a right encompassing due process guaranties.

(2) The charges against the officers, characterized as improper job performance are not of a nature that would stigmatize or injure their reputations, as would charges of dishonesty or immorality.

(3) A public employee cannot be dismissed solely because he makes statements critical of his superiors but may be dismissed for misfeasance where the city officials find that corrective action is necessary to eliminate conditions deemed inimical to the proper administration of a public agency.

Thus, it was established that a municipal employee who has no contract or commission and no fixed term of employment, and whose employment is therefore terminable at will and who had no unilateral expectation of continued employment has no property right guaranteed by the 14th Amendment to protect. Furthermore, a letter written by municipal employees to the municipality which reveals substantive problems which are matters of public concern and town officials thereafter take corrective action, discharging the employees, such action did not establish that the employees were dismissed because of their exercise of rights of free speech, where the dismissals resulted from findings of misfeasance made by a subsequently constituted investigatory panel.

From these authorities, we must conclude that a city employee may not be discharged for the exercise of 1st Amendment rights or for criticizing his superiors, but on the other hand he has no right to continued public employment and may be discharged for reasons deemed necessary by the elected governing body or the administrative officer charging by law with the responsibility and duty of managing and administering the affairs of the city.

It is generally held that a public employee, and particularly one serving the community as a fire fighter, does not have a full panoply of rights. He has no constitutional right to strike and may be subject, because of the protective nature of his work, to statutory anti-strike provisions.

The requirements of a fire department are very broad. There is a definite and extensive need for the viability of assignment of personnel because the department operates 24 hours per day and is the sole agency responsible for protecting the public and private property of the community from destructive conflagrations. There is need and responsibility to have at all times an alert and responsive coordinated agency employed for that purpose. A fire department takes on some aspects of a quasi-military organization because the department cannot afford the luxury of its fire fighters operating as individual units but must operate as an entity. There must be some type of internal discipline with strict controls over the activities of all the members of the department. Fire fighters must be trained to obey orders instantly for their own safety and the safety of their fellow fire fighters.

It is fundamental that an efficient and effective fire department must be maintained at all times and that a duty exists upon those in charge of administering the affairs of a municipality to promote and maintain a harmo-

nious relationship within such a sensitive agency so that the purpose for which the agency was created and is maintained will be responsive to its very important duties and obligations.

The bickering, the conflict and dissension among the fire fighters disclosed by the record in this case was brought about in large part by persistent complaints and charges made by some of the plaintiffs and because of widespread public criticism of the officials and the city administration by way of the news media, letters to the public forum in the press, and the circulation of petitions among citizens to establish a fair and impartial board to investigate and make binding findings of fact concerning the suspension of fire fighter Armstrong on February 24, 1970.

Though, as heretofore indicated, a public employee may not be dismissed because he makes statements critical of his superiors, at the same time it cannot be gainsaid that the city has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the employee, as a citizen, in commenting on matters of public concern and the interest of the city as an employer, in promoting the efficiency of the public services it performs through its employees. *Pickering v. Board of Education*, 391 U.S. 563, 568.

In the present case, the defendant is the person charged with the responsibility of maintaining the city's interest, and hence the public interest in the fire fighters' efficiency and discipline. Such factors are essential if government is to perform its responsibilities effectively and economically. To this end, the city, through its officials, must have wide discretion and control over the management of its personnel

and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operations and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony and ultimately impair the efficiency of an agency such as the one we have here. Thus, the city's interest in being able to remove an unsatisfactory employee is substantial.

The Court has reviewed the evidence, has heard the arguments and statements of counsel, has read the briefs and memoranda submitted, and upon being fully advised in the premises, makes the following:

FINDINGS OF FACT

1. The plaintiffs involved in these consolidated causes are Local 782, International Association of Fire Fighters; Keith Armstrong, James R. Martin, both of whom were formerly employed as fire fighters by the City of Salina; and Jack H. Gray, a fire captain, now retired; Guy Ryan III, Lawrence Bruzda and James R. Todd, presently employed by the City of Salina, Kansas as fire fighters and representing a class consisting of all fire fighters employed by Salina who are members of Local 782. The sole defendant is Norris Olson, the City Manager of the City of Salina, Kansas. The City of Salina is no longer a defendant, having been dismissed, and all parties are either employed by or were formerly associated with the City of Salina in some capacity.

2. At all times material in these consolidated actions, the City of Salina, Kansas, has been a city of the first class, operating under the city manager form of government and the defendant Norris Olson has been continuously serving

as City Manager thereof. Said City Manager is the sole defendant in these actions.

3. There are no rules, regulations, statutes, ordinances or any like provisions which prevent fire fighters from any of the following actions:

- (a) Writing letters to City Commissioners,
- (b) Writing letters to news media,
- (c) Preparing, signing and/or passing initiative petitions relating to any subject, including changing the form of city government, the City Manager, or replacing the City Manager,
- (d) Talking to or contacting city or state elected officials, or
- (e) Any of the foregoing being done by the wives, children or families of fire fighters.

4. Under date of January 6, 1971, Armstrong signed as the president of, and wrote the following letter on, Local 782's letterhead, the letter being referred to during the trial as the "action" letter:

"Chief Lacy,
222 W. Elm
Salina, Kansas 67401

Dear Chief,

The Executive Board of Local # 782 has been directed by the membership to meet with you before Monday, January 11, 1971.

We wish to discuss your action toward certain union members, as to merit raises, intimidations, and firing. Two other items for action are vacations, and the western show.

The membership of Local 782 wants you to know that if you are not willing to meet, and take action, ACTION will be taken.

I remain,

/s/ Keith E. Armstrong
Keith E. Armstrong
President IAFF Local 782"

5. The City Government of Salina, Kansas, is conducted by five elected commissioners, one of whom is designated as Mayor.

Under laws applicable to the City, the commissioners set and determine the policy of the City, leaving the administration of such policy strictly and solely in the Manager's hands.

The City Manager serves at the appointment and during the pleasure of the City Commissioners.

6. City Manager Olson, acting under authority provided him by the City Charter, requested the City Commissioners to conduct a hearing as to the problems in the Fire Department.

The investigation commenced in the fall of 1970 and was concluded in January of 1971.

All members of the Fire Department, the Fire Chief, Police Chief, Director of Safety, City Manager and other city officers were called as witnesses.

Only the individual under interrogation, plus the commissioners and reporter were present during each questioning.

All statements made were recorded by court reporters who later transcribed the testimony. Many of the individ-

ual transcripts of the testimony were received in evidence during the week long trial.

No attorneys were allowed to be present and all persons were promised that their statements would be kept confidential in order to induce the greatest amount of testimony, whether it be truth or hearsay.

7. Nearly every fire fighter was asked about his union membership, how many attended union meetings, what was said, and the like.

In an effort to shorten the trial, the attorneys for the parties stipulated:

That if the remaining 42 members of the Fire Department whose names appeared on the stipulation were called to testify each would state that he was asked one or more of these questions at the Commission hearing:

- (1) Are you a member of Local 782?
- (2) Did you vote on the censure resolution or have an opportunity to do so?
- (3) How long have you been a member of 782?
- (4) What are the monthly dues to belong to 782?
- (5) How many men attend union meetings?
- (6) How many Salina fire fighters belong to local 782?

8. A meeting was conducted on February 5, 1970, by City Manager Olson. In attendance were the McCabe brothers, Lacy, Harris, Dunn, Bross, Vaupel, Gray, Glendening, all fire fighters, plus 9 other department heads and the City Attorney.

Olson conducted the meeting and gave out copies of his memorandum entitled "Summary of Meeting Conducted by the City Manager, February 5, 1970, relative to personnel and supervisory problems within the Fire Department." The memorandum was received in evidence as Plaintiffs' Exhibit 9.

Exhibit 9 was a nine page document on legal size paper and it dealt mainly with Fire Department matters.

Chief among the instructions given by Olson were these:

<u>Paragraph</u>	<u>Covering</u>
7-(m)	The supervisors would be held accountable for the actions and/or acts of personnel under them, including . . . writing letters to the editors, issuing complaints to commissioners, etc.
7-(o)	Failure to discharge your responsibilities may result in disciplinary action for self or men. Such action to include reprimand, probation, demotion, suspension, discharge of any combination with or without pay.
7-(u)	If you have any problem children, know it alls, loud mouths, rebels, etc., if they don't fit, recommend they be turned out to pasture.
8	If union gets into trouble, the only recourse is to deal with the officers of the union.

All present were told to write "satisfaction letters" indicating they liked their jobs or be fired.

A fair analysis of the instructions as given and understood by those receiving Plaintiffs' Exhibit 9 clearly indicates that Olson fully intended that the petitions and writings be stopped or the men were to be fired.

9. At a meeting conducted by Olson in his office on February 11, 1970, Olson, Harris, Lacy, Hobart McCabe, and all Fire Captains were present. Also present from the union were fire fighters Armstrong, Kriegh, Wright, Bowels, and Labbe.

Armstrong had sent a request through "chain of command" asking for a meeting between the Manager and the Union.

Olson opened the meeting demanding to know if the Union or Fire Department had requested the meeting. When Armstrong tried to answer, Olson told him to shut up.

During the meeting, whenever Armstrong tried to talk, Olson told him to shut his mouth or be thrown out of the meeting.

Again, Olson wanted letters of satisfaction with jobs to be written. He produced files showing backgrounds and former jobs of fire fighters and discussed such information freely.

The men were warned by Olson that if they discussed the situation or went to commissioners, he would change their work schedule so they would have to work longer hours.

10. At a meeting conducted by Hobart McCabe, Director of Safety, on March 13, 1970, Lacy, Captains Dunn, McCabe, Bross, Glendening, Vaupel, Assistant Chief Nichols and Lt. Freeman were present.

Those present were told by McCabe to get petitions off streets by 8:00 a.m. or be fired.

They were also told that he must interview each man on the shift and ask them to fill out questionnaires like Plaintiffs' Exhibits 4, 18 and 35.

Captains had to write back letters indicating compliance by all men or the captains would be fired.

Letters recommending the firing of Caswell, Armstrong, Martin, Tinkler and others were written by Captains.

They were told to tell men they could not write letters to editors and were advised that the initiative petitions violated department procedure.

Every man to be responsible for his wife's actions, and no letter writing or talking to commissioners.

Captains must do their job as he outlined or be fired.

Anyone striking would automatically be fired.

All this was done to comply with Olson's instructions of February 5, 1970, Exhibit 9.

11. The questionnaire arising out of the meeting of March 13, 1970, generally covered the following questions:

1. Are you happy with your job?
2. Do you think about your income and what you would do if you lost your job?
3. If you are passing petitions, will you stop?
4. Will you strike?
5. Will you help Lacy and others build a better department?
6. Do you want to be a fireman?

12. In the matter of granting "merit" pay increases to City employees the defendant Norris Olson, as City Manager, relied upon the recommendations submitted by the supervisory heads of the different City departments, including the Fire Department of the City of Salina. There is no evidence that the defendant Norris Olson himself denied any plaintiff a "merit" increase because such employee hired attorneys nor that he denied to any of them any "merit" pay increases recommended by the supervisory departmental heads, James Lacy and Hobart J. McCabe.

13. Plaintiff, Jack H. Gray, was given the choice of retirement or dismissal in October 1970, by the defendant Norris Olson. Plaintiff Gray elected to retire and has ever since been receiving full retirement benefits and has not been an employee of the City of Salina since such retirement. The action taken by the defendant Norris Olson was based on the recommendation of Fire Chief Lacy. The recommendation was made because of plaintiff Gray's incompatibility with the Fire Department in not attempting to get along with his supervisors, his inability or refusal to discipline his men for the inefficient performance of their department duties, and because of his inability to run an overall smooth shift and did not communicate or cooperate with his supervisors on the problems existing on his shift.

14. In February of 1970, defendant Norris Olson did order plaintiff, Keith Armstrong, suspended for two weeks without pay, and in January 1971, defendant Norris Olson did discharge plaintiff, Keith Armstrong, from his employment in the Salina Fire Department. The suspension and discharge of plaintiff, Keith Armstrong, was based on his disregard of established administration policies, failure to follow the chain of command, insubordination, his "demanding" attitude to his supervisors, and particularly because of the threatening "ACTION" letter written and de-

livered by him to the Administration (Plaintiffs' Exhibit 12). Said letter prompted the City Commission, as a part of its investigation report, to recommend his discharge from the Fire Department.

15. In January of 1971, defendant Norris Olson did discharge plaintiff James Martin from his employment in the Fire Department of Salina. The discharge resulted because of plaintiff Martin's failure to cooperate with the Fire or Police Departments. Plaintiff James Martin did not appear in this trial, did not testify herein and offered no evidence.

16. The defendant Norris Olson, as City Manager, in taking the action set forth in Findings of Fact paragraphs 13, 14 and 15 did so because he believed such actions were necessary to the proper administration and operation of the Salina Fire Department. Said actions, and each of them, were done by defendant Norris Olson in the performance of his administrative and governmental functions as City Manager of Salina.

17. The City of Salina, Kansas, has had a Fire Fighters Union continuously for approximately 30 years. All of the plaintiffs who testified at one time or another belonged to the Salina Fire Fighters Union. Hobart J. McCabe, Director of Safety, James Lacy, Fire Chief, and the Fire Captains who testified, all had, in fact, belonged to the Fire Fighters Union at one time or another. None of the plaintiffs nor any other witnesses were suspended or discharged because of union membership.

18. The Board of City Commissioners, the governing body of Salina, between October 1970 and January 1971, at the request of the defendant Norris Olson conducted an investigation into the affairs of the Salina Fire Department because of the air of unrest prevailing in the com-

munity. The atmosphere of unrest was partially created by the conduct of certain members of the Fire Department, which conduct included the resolution of censure of the City Commission of the City of Salina (Defendant's Exhibit C) which gained statewide publicity through the news media and the circulation of the petition seeking union recognition as part of a Fact Finding Board to make Finding of Fact binding upon the City (Plaintiffs' Exhibit 1). Because of the statewide publicity the air of unrest and turmoil in the community, and, because of the request of the defendant Norris Olson, the Salina City Commissioners determined it was necessary to investigate into the affairs of the Fire Department to determine the cause of the unrest and turmoil.

19. At all times prior to the filing of these actions, the individual plaintiff employees in the Fire Department of the City of Salina accepted and cashed each of their payroll checks without protest.

20. Each Finding of Fact set forth in the foregoing Findings of Fact deemed to be a Conclusion of Law is hereby found to be a Conclusion.

CONCLUSIONS OF LAW

1. The defendant, Norris Olson, as City Manager of the City of Salina, Kansas, a city of the first class, operating under the Commission-Manager form of government, is charged with the governmental duties and responsibilities for the management and administration of all of the affairs of the City of Salina. Included within said governmental duties is the exclusive duty and power to appoint and remove heads of departments and all subordinate officials and employees as may be necessary to the efficient operation of the city's business.

2. Throughout the period of time material to these actions and while employed in the Fire Department of Salina, Kansas, each of the individual plaintiffs was an employee at will, subject to termination by himself or by defendant Norris Olson, as City Manager.

3. The so-called "meet and confer" law (K.S.A. 75-4321, et seq., 1971 Supp.) was enacted by the Legislature April 9, 1971, to become effective March 1, 1972. Under the provisions of said law, the City of Salina, Kansas, is given the option of electing to come under the Act through formal action by its governing body. Until such action is taken, the City of Salina is not bound by the provisions thereof. To date, the governing body of Salina has not made the election to come under the provisions of the Act. (See K.S.A. 75-4321, 5(c).)

4. Plaintiffs have failed to establish the claim asserted by a preponderance of the evidence and, therefore, judgment should be entered as follows:

(a) In favor of the defendant against the plaintiffs for the money damages and attorneys' fees;

(b) In favor of the defendant against the plaintiffs on the question of injunctive relief and such relief is therefore denied.

(c) Defendant is entitled to judgment for his costs.

5. Each Conclusion of Law set forth in the foregoing Conclusions of Law deemed to be a Finding of Fact is hereby found to be a Finding of Fact.

Defendant's counsel will prepare, circulate and submit form of judgment to be hereafter entered by the Court.

APPENDIX "C"

Constitution of the State of Kansas

Article 15, Section 2

"Tenure of office; merit system in civil service. The tenure of any office not herein provided for may be declared by law; when not so declared, such office shall be held during the pleasure of the authority making appointment. . ."

Article 15, Section 12

Membership or nonmembership in labor organizations. No person shall be denied the opportunity to obtain or retain employment because of membership or nonmembership in any labor organization, nor shall the state or any subdivision thereof, or any individual, corporation, or any kind of association enter into any agreement, written or oral, which excludes any person from employment or continuation of employment because of membership or nonmembership in any labor organization.

APPENDIX "D"

Kansas Statutes

K.S.A. 12-1011

12-1011. Same; powers and term of manager. The administration of the city's business shall be in the hands of a manager. He shall be appointed by the commission, and shall hold office at the pleasure of the board.

K.S.A. 12-1014

12-1014. Same; duties and functions of manager; civil service commission in certain cities; appointments. The manager shall be responsible for the administration of all of the affairs of the city. He shall see that the laws and ordinances are enforced. He shall appoint and remove all heads of departments, and all subordinate officers and employees of the city. All appointments shall be made upon merit and fitness alone. . .

K.S.A. 1974 Supp. 75-4321(c)

(c) The governing body of any public employer, other than the state and its agencies, by a majority vote of all the members may elect to bring such public employer under the provisions of this act, and upon such election the public employer and its employees shall be bound by its provisions from the date of such election. Once the election has been made to bring the public employer under the provisions of this act it continues in effect unless rescinded by a majority vote of all members of the governing body. No vote to rescind shall take effect until the termination of the next complete budget year following such vote. (L. 1971, ch. 264, §1; March 1, 1972.)

APPENDIX "E"**Code of the City of Salina, Kansas****Section 2-75**

The commission shall, whenever by virtue of a vacancy in said office it becomes necessary, appoint a manager who shall be responsible for the administration of all of the affairs of the city, and hold office at the pleasure of the board. The manager shall be chosen solely on the basis of administrative ability and the choice shall be not limited by any residence qualifications.

Section 2-77

Sec. 2-77(1). The manager shall be responsible for the administration of all of the affairs of the city.

Sec. 2-77(2). He shall see that the laws and ordinances are enforced.

Sec. 2-77(3). He shall appoint and remove all heads of departments and all subordinate officers and employees of the city. All such appointments shall be made upon merit and fitness.

Sec. 2-77(4). The manager shall have the option to require the appointment of a civil service commission as established by the provisions of K.S.A. 13-2201. The board of commissioners at the request of the manager, shall appoint civil service commissioners as is now or may hereafter be provided for by law for cities of the State of Kansas.

Sec. 2-77(5). He shall be responsible for the discipline of all appointive officers and may, without notice, cause the affairs of any department or the conduct of any officer or employee to be examined.

Sec. 2-77(6). He shall prepare and submit the annual budget to the board of commissioners and also keep the board of commissioners fully advised as to the financial condition and needs of the city.

Sec. 2-77(7). He may make recommendations to the commissioners on all matters concerning the welfare of the city, and shall have a seat, but no vote, in all of the public meetings of the board of commissioners.

Sec. 2-77(8). He shall perform such other and further duties as may be required by law or ordinance.

Section 2-78

The administration of the city's business shall be in the hands of the manager.

APPENDIX "F"**Personnel Manual of Salina, Kansas****Chapter 4, Section IV-2**

Any employee may be dismissed for just cause. Such action shall be taken only when other forms of disciplinary action or penalties are deemed inappropriate or have proven ineffective in dealing with the particular employee. The department head shall make written recommendation to the City Manager for approval of any dismissal. The employee shall be notified, in writing, of the reason for his dismissal. (Adopted Jan. 25, 1971).